IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 479 OF 2004

Mrs. Ivy Muriet Fonseca,
major of age, r/o
`Radiant Park', 968,
Nath Peth, Pune- 2. ... Petitioner

Versus

Mr. Porus Adi Doctor,
major of age, s/o
Adi H. Doctor, r/o `Perin
Villa', B.B. Borkar Road,
Alto Porvorim, Bardez, Goa. ... Respondent.

Mr. S.D. Lotlikar,Senior Advocate with Mr. R.S. Sardesai, advocate for the petitioner.

Mr. Anthony D'Silva, advocate for the respondent.

CORAM : A. P. LAVANDE, J.

DATE OF RESERVING THE JUDGMENT : 14th January, 2005.

DATE OF PRONOUNCING THE JUDGMENT: 20th January, 2005.

JUDGMENT

Heard Mr. Lotlikar, learned Senior Advocate on behalf of the petitioner and Mr D`Silva, learned advocate appearing on behalf of the respondent.

2. Rule. By consent of the learned counsel appearing for the parties, heard forthwith.

3. By this petition, the petitioner challenges the Order dated 20th August, 2004, passed by the learned Civil Judge, Senior Division `C' Court at Mapusa, in Special Civil Suit No.85/2001/C, dismissing an application dated 27th November, 2002, filed by the petitioner for production of certain documents mentioned in paragraph 2 of the application. The petitioner is the defendant in the above-referred suit and the respondent is the plaintiff in the said suit. In a suit for specific performance of an agreement, the defendant filed an application seeking to produce six documents, which according to the petitioner are relevant for deciding the real matters in controversy between the parties. The application was opposed by the respondent and by the impugned Order the trial Court rejected the prayer of the petitioner to rely upon and produce the said documents. After hearing both the sides, the learned trial Judge dismissed the application holding that no case was made out by the petitioner/defendant for producing the said six documents relied upon by her and consequently, dismissed the application. The learned Judge has relied upon the provisions of Order XIII and Order VIII of the Civil Procedure Code in support of his findings that the petitioner is not entitled to rely upon and produce the said documents.

4. Mr. Lotlikar, learned Senior Counsel, appearing for the petitioner has submitted that the trial Court has exercised jurisdiction illegally and that the impugned Order discloses an error of law apparent on record. According to the learned counsel, the said documents are relevant for proving the case set up by her. According to the learned counsel, there is no absolute bar for the defendant in a suit to rely upon and produce the documents after issues are framed in the suit. The learned counsel submits that even in an appeal upon sufficient cause being shown, the appellant can rely upon and produce documents under Order XLI Rule 27 C.P.C. and, therefore, it cannot be said that once issues are framed the defendant is precluded from relying upon and producing any document which was not relied upon and produced before framing of issues. According to the learned counsel, gross injustice would be caused to the petitioner/defendant if the impugned Order is allowed to stand and the petitioner is precluded from relying upon and producing the documents.

5. Mr. D`Silva, the learned counsel appearing for the respondent, has submitted that the trial Court has not committed any jurisdictional error and no interference is called for by this Court against the impugned Order. The learned counsel has further submitted that the documents are totally irrelevant since the suit filed by the respondent is for specific performance. He further submitted that the

jurisdiction of this Court to interfere with the impugned Order is very limited and having regard to the limited jurisdiction of this Court to interfere in the exercise of writ jurisdiction, this is not a fit case in which the impugned Order deserves to be set aside. In support of his submissions, the learned counsel relied upon the following authorities:-

1. ***Deenanath vs. Chunnilal,*** (AIR 1975 Raj.69),

2. *Surya Dev Rai vs. Ram Chander Rai & Ors.* ,(AIR 2003 SC 3044),

3. ***Madanlal vs. Shyamlal,*** ([2002] 1 SCC 535), and

4. ***A. Abdul Rashid Khan (dead) & Ors. vs. P.A.K.A. Shahul Hamid & Ors.*** , ([2000] 10 SCC 636).

6. I have considered the submissions made by the learned counsel for the parties. I have also gone through the judgments relied upon by the learned counsel for the respondent. At the outset, it is pertinent to note that Order VIII Rule 8-A of the C.P.C. has been omitted by the Civil Procedure Code (Amendment) Act 1999, which has come into force from 1st July, 2002. By the said Amendment Act, Order VIII Rule 1-A has been inserted, which reads as under:-

> ***"1-A Duty of defendant to produce documents upon which relief is claimed or relied upon by him*** . -
> (1) Where the defendant bases his defence upon a document or relies upon any document in his possession or power, in support of his defence or claim for set-off or counter-claim, he shall enter

> such document in a list, and shall produce it in Court when the written statement is presented by him and shall, at the same time, deliver the document and a copy thereof, to be filed with the written statement.
>
> (2) Where any such document is not in the possession or power of the defendant, he shall, wherever possible, state in whose possession or power it is.
>
> (3) A document which ought to be produced in Court by the defendant under this rule, but, is not so produced shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.
>
> (4) Nothing in this rule shall apply to documents -
>
> (a) produced for the cross-examination of the plaintiff's witnesses, or
>
> (b) handed over to a witness merely to refresh his memory.

Insofar as Order XIII Rule 1 C.P.C. is concerned, no doubt the same provides that the parties or their pleader shall produce on or before the settlement of issues, all the documentary evidence in original and where the copies thereof have been filed along with the plaint, or the written statement. However, the point for consideration is whether a party can be permitted to rely upon and produce the documents if not already relied upon and produced by him/her prior to framing of issues, after seeking leave of the Court.

7. At this stage, what has to be considered is

whether the documents are, prima facie, relevant for the purpose of deciding the controversy between the parties and whether the petitioner/defendant could have relied upon and produced the said documents. No doubt the submission of the learned counsel appearing for the respondent that in a suit for specific performance the title is rendered defective is irrelevant but, at the same time, at the stage of production of documents it is premature for a Court to decide whether the document could be admitted in evidence. At the stage of production of documents, only a prima facie view has to be taken and whether the documents are admissible has to be decided at the stage of the trial. That being the position, I am unable to accept the submission made by the learned counsel appearing for the respondent that the said documents cannot be relied upon and produced by the petitioner on the ground that they are irrelevant. Insofar as the submission of the learned counsel for the respondent that the jurisdiction of this Court is very limited while interfering with an order of the type which is impugned is concerned, there can be no dispute that the jurisdiction is limited as laid down by the Apex Court in the judgment in the case of ***Surya Dev Rai vs. Ram Chander Rai & Ors.*** (supra). In paragraph 38 of the said judgment, the Apex Court has summed up the conclusions dealing with the power of the High Court under Articles 226 and 227 of the Constitution of India against interlocutory order passed by the

subordinate courts. It would be appropriate to reproduce paragraph 38 of the judgment which reads as under:-

> "38. Such like matters frequently arise before the High Courts. We sum up our conclusions in a nutshell, even at the risk of repetition and state the same as hereunder:-
>
> (1) Amendment by Act No.46 of 1999 with effect from 1-7-2002 in Section 115 of the Code of Civil Procedure cannot and does not affect in any manner the jurisdiction of the High Court under Articles 226 and 227 of the Constitution.
>
> (2) Interlocutory orders, passed by the courts subordinate to the High Court, against which remedy of revision has been excluded by the CPC Amendment Act No.46 of 1999 are nevertheless open to challenge in, and continue to be subject to certiorari and supervisory jurisdiction of the High Court.
>
> (3) Certiorari, under Article 226 of the Constitution, is issued for correcting gross error of jurisdiction, i.e. when a subordinate court is found to have action (i) without jurisdiction - by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice.
>
> (4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate Courts within the bounds of their jurisdiction. When the subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it

does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.

(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (iii) a grave injustice or gross failure of justice has occasioned thereby.

(6) A patent error is an error which is self-evident i.e., which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn process of reasoning. Where two inferences are reasonably possible and the subordinate court has chosen to take one view the error cannot be called gross or patent.

(7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of he abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred there against and entertaining a petition invoking certiorari or supervisory jurisdiction of High Court would obstruct the smooth flow and/or early

> disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.
>
> (8) The High Court in exercise of certiorari or supervisory jurisdiction will not covert itself into a Court of Appeal and indulge in re-appreciation or evaluation of evidence or correct errors in drawing inferences or correct error of mere formal or technical character.
>
> (9) In practice, the parameters for exercising jurisdiction to issue a writ of certiorari and those calling for exercise of supervisory jurisdiction are almost similar and the width of jurisdiction exercised by the High Courts in India, unlike English courts has almost obliterated the distinction between two jurisdictions. While exercising jurisdiction to issue a writ of certiorari the High Court may annul or set aside the act, order or proceedings of the subordinate courts but cannot substitute its own decision in place thereof. In exercise of supervisory jurisdiction the High Court may not only give suitable directions so as to guide the subordinate Court as to the manner in which it would act or proceed thereafter or afresh, the High Court may in appropriate cases itself make an order in supersession or substitution of the order of the subordinate court as the court should have made in the facts and circumstances of the case."

In paragraph 38 (5) the Apex Cort has held that the supervisory jurisdiction of the High Court can be invoked if the error is

manifest and apparent on the face of the proceedings, such as when it is based on clear ignorance or utter disregard of the provisions of law and grave injustice or gross failure of justice is occasioned thereby.

8. Having regard to the factual position in the matter, it is clear that the petitioner/defendant has filed the application seeking to rely upon the documents which are mentioned in paragraph 2 of the petition which appear to be, prima facie, relevant. Therefore, the trial Court has committed an illegality in dismissing the application filed by the petitioner by not granting leave under Order VIII Rule 1-A (3) of the Civil Procedure Code. In order to do substantial justice between the parties, the defendant ought to have been permitted to rely upon and produce the said documents and by dismissing the application filed by the petitioner the trial Court has committed manifest error which is apparent on the face of the record, thereby resulting in failure of justice which requires to be corrected by this Court. The trial Court ought to have permitted the petitioner to rely upon and produce the said documents mentioned in the application. Whether the documents can be tendered in evidence is a matter to be decided at the stage of leading evidence by the parties and the mere fact that the party is permitted to rely upon and produce the documents does not mean that the said documents ought to be admitted in evidence at the stage of the trial.

9. In view of the above discussion, I find that the

impugned Order cannot be sustained and, accordingly, the impugned Order is set aside. The petitioner is permitted to rely upon and produce the said documents. The trial Court is free to decide the issue of admissibility of the said documents at the time of leading evidence by the parties.

10. In the result, therefore, the petition is allowed in the aforesaid terms. Having regard to the facts and circumstances of the case, parties are directed to bear their own costs.

A. P . LAVANDE, J.

mc.